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ARIZONA ATTORNEY GENERAL

January 12, 1954
Opinion No. 54-7

TO: Mr. James D. Kaffenberger
The State Egg Inspector
Capitol Building
Phoenix, Arizona

RE: Legal authority of the Egg
Inspector to make "rules".

QUESTION: Does the State Egg Inspector
have the legal authority to
make a "rule" requiring dealers
and producers who are candling,
grading and cartoning, or pack-
aging eggs for "resale" to place
the date when said eggs were
packed or graded on said contain-
ers and to place the same infor-
mation as well as the delivery
date on the invoice furnished to
the purchaser?

The necessary authority, if any, for the egg inspector to
make such a "rule" is contained in Section 68-939, subsection (g),
A.C.A. 1939, as amended, which states:

"68-939. Authority--Enforcement--Inspection
--Evidence--Prosecution.--

* * * * *

(g) The state egg inspector and his deputies
must enforce the provision of this act in con-
formity with rules and regulations promulgated
by the inspector. The refusal of any officer
authorized under this act to carry out the orders
and directions of the inspector in the enforce-
ment of this act or prosecutions hereunder is
negligence of duty. The state egg inspector shall
make and enforce such rules and regulations as
may be necessary to carry out the provisions of
this act."

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The unvarnished import of this statute is to the effect that the egg inspector shall have the duty to make such "rules" as may be necessary to carry out the provisions of the Egg Act. In this respect it is significant to note that the egg inspector "must enforce the provisions of the act" in conformity with rules and regulations promulgated by the inspector. Obviously, the only rule making powers bestowed upon the egg inspector are those necessary to enforce or carry out some provision of the egg act. It is equally clear that the statutory provision must first exist before the necessity for a rule may arise.

The logical deduction in the instant case is that before the egg inspector may legally promulgate the rule in question it must be necessary to enforce a provision of the egg act which establishes the date of candling, grading or packaging of eggs as a factor in the sale of eggs. Section 68-921, subsection (b), A.C.A. 1939, as amended, has been suggested as being such a statutory provision:

"68-921. Invoice showing the size and quality
--Exceptions.--

(a) Every person selling eggs to a dealer, retailer, manufacturer, hotel, hospital, restaurant, other eating place or consumer shall furnish an invoice showing date of sale, the exact size and quality of such eggs according to the standards prescribed by this act; together with the name and address of the person buying and selling the eggs. An egg purchase ticket given by a dealer to a producer when the producer sells uncandled and ungraded eggs to said dealer shall be deemed as complying with the provisions of this section. A copy of such invoice or egg purchase ticket shall be kept on file by the person selling and by the buyer at their respective place of business for a period of thirty (30) days and shall be open at all reasonable times to the inspection of the state egg inspector.

(b) Any person having any such eggs marked in accordance with the invoice and who shall keep such eggs for such time after they are purchased as to cause the same to deteriorate to a lower grade or standard and shall then offer or expose for sale such eggs under the mark of the invoice grade or standard, shall be deemed guilty of a violation of the provisions of this act."

Subsection (a) of the above-quoted code section commands an invoice to be given by a "person selling eggs to a dealer, retailer,

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manufacturer, hotel, hospital, restaurant or other eating place or consumer" to such purchaser. The aforesaid code section indicates in detail the information to be included on said invoice a portion of that information being the "date of sale".

Subsection (b) of Section 68-921, supra, provides that the person keeping eggs for "such time after they are purchased" as to cause the same to deteriorate to a lower grade than shown on the invoice grade shall be guilty of a violation of the provisions of this act. This statute clearly hinges on the data specifically provided by subsection (a) which is the date of sale and grade of eggs established on the invoice. It would appear that the only thing to be determined or established by the egg inspector is that the present grade and condition of the eggs is either equal to or lower than that established on the invoice. It would naturally follow that any rule to be promulgated by said egg inspector must be a necessary rule to determine this present condition. This is especially true because of the fact that the responsibility of offering lower grade eggs for sale is clearly established as being that of the present seller.

The penalty for violating a provision of the egg act is set forth in Section 68-948, A.C.A. 1939, as amended, which provides:

"68-948. Penalty--(a) Any person who violates any provision of this act, or who interferes with the state egg inspector or his deputy in the discharge of his duties is guilty of a misdemeanor;

(b) In addition a violation of any of the provisions of subsections (a) and (b) of section 26 (S. 68-937) shall be penalized as stated in subsection (c) of section 26;

(c) In addition a violation of subsections (a) and (b) of section 30 (S. 68-941) shall be penalized as stated in subsection (c) of section 30. (Laws 1952, Chapter 90, S. 37.)"

Therefore, any person who violates "a provision of the egg act is guilty of a misdemeanor. It has been well established by the courts that the legislature may provide a legal sanction for violation of the rules and regulations which it may empower administrative authorities to enact; however, the legislature did not establish such a legal sanction relative to the rules and regulations of the egg inspector. It is equally as well settled that the power to declare what is a crime and how it shall be punished is solely a legislative power.

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Consequently, as a practical matter, even if the egg inspector had the legal authority to promulgate the rule in question, which he does not, he would be powerless to enforce such a rule because a violation thereof would not be "a violation of any provision of this act," and consequently the persons affected would be able to disregard it with impunity since the penal section would not apply thereto.

ROSS F. JONES
The Attorney General

JOHN R. ELLIOTT
Assistant to the
Attorney General

JRE:PMO